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Quarterly top 10 tax topics
November 2024

Singapore

1 Singapore Fund Tax Exemption Schemes

The Monetary Authority of Singapore (MAS) issued a circular on 1 October 2024 providing details of the enhancements and refinements of the Singapore fund tax exemption schemes (Tax Exemption Schemes) which will be effective from 1 January 2025 for the existing award holders as well as the new applicants on or after 1 January 2025.

The MAS has considered the industry feedback and carefully calibrated the refined conditions to ensure the substance requirements in Singapore, while continuing to support the growth of fund and asset management sector in Singapore.

Below is a summary of the key tax changes applicable to non-Single Family Office funds (including Single Purpose Vehicles (SPVs)).

1. Extension

- The Tax Exemption Schemes are extended for next five years i.e. until 31 December 2029.
- The Goods and Services Tax (GST) remission and Withholding Tax (WHT) exemption on interest and other qualifying payments made to non-residents are also extended.
- Funds under the Tax Exemption Scheme on or before 31 December 2029 enjoy the tax exemption for the life of the fund, provided they continue to meet the conditions throughout the life.
- As has been in the past, the Government will conduct a review of the Tax Exemption Schemes to assess the usefulness and relevance of the schemes to determine if these should be extended or refined beyond 31 December 2029.

2. Changes to the economic criteria

- The following three criteria are collectively referred to as "Economic Criteria":

  i. The minimum Asset Under Management (AUM) in Designated Investment (DI)
  ii. The minimum local business spending (LBS); and
  iii. The minimum Investment Professional (IP) [i.e. individuals employed full-time by the capital market services (CMS) licensed entity meeting prescribed criteria]

- The minimum fund size requirement will be tested using the AUM in DI (instead of net asset value), which refers to net amount of DIs recognized as assets in the statement of financial position in accordance with relevant accounting standards and loans (including shareholder loans) taken to finance DI need not be taken into account as a liability in arriving at the gross asset value of the fund in DI.
- The MAS has clarified that funds that are unable to fulfil any of the economic criteria in a particular year will not be able to avail themselves of the tax exemption benefit in that year and will not result in revocation of their Tax Exemption Scheme status. The funds will be able to enjoy tax exemption in subsequent years once they are able to fulfil all the economic criteria such subsequent years.
- Please refer to the paragraphs below for refinement of Economic Criteria under respective Tax Exemption Scheme.

3. Section 13O

<table>
<tr><th>Economic Criteria</th><th colspan="2">New requirements (on or after 1 Jan 2025)</th><th>Old requirements (until 31 Dec 2024)</th></tr>
<tr><td>Minimum Size (committed capital concession available)</td><td colspan="2">AUM in DI : SGD5 million as at the end of each financial year</td><td>Nil</td></tr>
<tr><td rowspan="5">Minimum annual spending</td><td colspan="2">Tiered operating LBS paid to contracting parties in Singapore as follows (pro-rata for first and last year of incentive):</td><td rowspan="5">Operating total business spending of SGD200,000, regardless of the location of contracting parties.</td></tr>
<tr><td>AUM in DI as at end of each financial year</td><td>LBS</td></tr>
<tr><td>< SGD250 million</td><td>SGD200,000</td></tr>
<tr><td>SGD250 million less than SGD2 billion</td><td>SGD300,000</td></tr>
<tr><td>At least SGD2 billion</td><td>SGD500,000</td></tr>
<tr><td>Minimum headcount</td><td colspan="2">Two</td><td>Nil</td></tr>
</table>

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1 Singapore Fund Tax Exemption Schemes (cont.)

4. Section 13U

- Any Section 13U structure will only need to meet the economic criteria as though the structure is a single fund entity, regardless of any trading feeder funds or SPVs in the structure. In other words, the requirement of AUM in DI and LBS will not multiply based on the number of feeder funds and / or SPVs, so long as the structure is under a Section 13U award. However, any addition of feeder fund(s) or SPV(s) to the fund structure must be approved by the MAS.

<table>
<tr><th>Economic Criteria</th><th colspan="2">New requirements
(on or after 1 Jan 2025)</th><th>Old requirements
(until 31 Dec 2024)</th></tr>
<tr><td>Minimum Size (committe d capital concession available)</td><td colspan="2">AUM in DI : SGD50 million as on the date of application and as at the end of each financial year</td><td>SGD50 million as on the date of application</td></tr>
<tr><td rowspan="5">Minimum annual spending</td><td colspan="2">Tiered operating LBS paid to contracting parties in Singapore as follows (pro-rata for first and last year of incentive):</td><td rowspan="5">Operating LBS of SGD200,000 paid to contracting parties in Singapore.</td></tr>
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<tr><td>Minimum headcount</td><td colspan="2">Three</td><td>Three</td></tr>
</table>

5. Section 13D

- The CMS licensed fund manager directly managing or advising Section 13D fund will need to have at least one IP to ensure a minimum level of economic substance in Singapore. There is no minimum salary requirement for such IP.
- All the other conditions remain the same, including self-assessment.

6. Introduction of new Section 13OA scheme for Singapore limited partnerships with effect from 1 January 2025

- There is no tax residency requirement for the partners of the limited partnership.
- Similar to Section 13U, the conditions will be applied at the limited partnership level (i.e., no look-through) and the General Partner will be responsible for meeting the incentive conditions.
- The Economic Criteria, grace period and 30/50 rule for investor will apply similarly as Section 13O.
- A partner of such approved limited partnership will be exempt on its share of exempt income derived by the limited partnership.

7. Introduction of "close-end fund" option for Section 13O, 13OA, 13U

- A closed-end fund is referenced as one having designated fund-raising and redemption period(s), and it must provide supporting documentation to MAS upon request.
- A fund can make a one-time irrevocable voluntary opt-in to apply for the closed-end fund treatment.
- The option is available for existing award holders, but such an application would entail the revocation of the existing incentive award and the application for a new award.
- The funds opting for the closed-end fund treatment may also avail of the committed capital concession.
- Key features with respect to Economic Criteria:

  i. Annual AUM to be met up to the 5th year of incentive and will be waived from the 6th year onwards
  ii. Annual tiered LBS to be met on a cumulative basis up to the 10th year and waived from the 11th year onwards
  iii. The fund is required to have its award revoked with effect from the end of its divestment phase, or the day immediately after its 20th incentive year, whichever is earlier.

8. Grace period

<table>
<tr><th>Awards commencing on or before 31 December 2024</th><th>AUM in DI</th><th>IP</th><th>Tiered LBS</th></tr>
<tr><td>Section 13O</td><td colspan="3" rowspan="2">Grace period to meet the new conditions with effect from financial year ending in 2027 (Year of Assessment 2028)</td></tr>
<tr><td>Section 13U</td></tr>
</table>

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1 Singapore Fund Tax Exemption Schemes (cont.)

8. Grace period (cont.)

<table>
<tr><td>Awards commencing on or after 1 January 2025</td><td>AUM in DI</td><td>IP</td><td>Tiered LBS</td></tr>
<tr><td>Section 13O (commencing on or after 1 January 2025 and financial year ending in 2026)</td><td rowspan="2">Grace period to meet the new condition by the end of the third year of the incentive and to maintain it in every financial year thereafter</td><td colspan="2">Grace period to meet the new conditions with effect from financial year ending in 2027</td></tr>
<tr><td>Section 13O (commencing in financial year ending in (or after) 2027)</td><td colspan="2">No grace period</td></tr>
<tr><td>Section 13U</td><td colspan="3">No grace period</td></tr>
<tr><td>Section 13D</td><td>N.A.</td><td>Grace period to meet the new condition with effect from financial year ending in 2027</td><td>N.A.</td></tr>
</table>

9. Other refinements

- Similar to Section 13U, an applicant will be considered as compliant with the condition of Section 13O where an investment is made prior to filing the application.
- Section 13O and Section 13U approved funds will be required to only notify (and not seek a prior approval) for a change in the investment strategy for bona fide commercial reasons.
- Waiver of the 30/50 rule for investors in Section 13O and Section 13D funds, which are trusts and unit trusts incentivized under the Section 13D scheme with effect from Year of Assessment 2025.
- The conditions for a managed account under Section 13D or Section 13U largely remain the same with further clarifications provided for contractual arrangement with the fund manager and custodian.
- Investment in a non-publicly-traded partnership qualifies as a DI provided that (i) it does not carry on a trade, business, profession or vocation in Singapore; and (ii) invests wholly in designated investments specified in this list. In this regard, the MAS has clarified that:
  - for (i), a partnership carrying on only investment activities through a Singapore fund manager will not be considered to be carrying on a trade, business, profession or vocation in Singapore.
  - for (ii), if a partnership invests in non-DI, a look-through treatment could be applied to determine the allocation of the partnership distribution from specified income arising from DI. Funds must be prepared to provide the relevant supporting documents to substantiate this upon request.

2 Singapore updates key sections of its transfer pricing guidelines

On 14 June 2024, the Inland Revenue Authority of Singapore (IRAS) released the Transfer Pricing Guidelines (TPG) (Seventh Edition). Compared to the sixth edition TPG, published on 10 August 2021, the seventh edition TPG provides updates and additional transfer pricing (TP) guidance in several areas. Singapore's transfer pricing documentation (TPD) rules have also been amended to reflect the changes in the seventh edition TPG.

The key changes in the seventh edition TPG and TPD rules include:

1. **Additional guidance on TP aspects for financial transactions**

The TPD rules and seventh edition TPG exempt any related party domestic loan entered on or after 1 January 2025 from TP documentation if neither the lender nor the borrower is in the business of borrowing and lending and the IRAS indicative margin is applied.

2. **Increased thresholds for exemption from TPD requirements for certain transactions from Year of Assessment (YA) 2026**

The thresholds for exemption from TPD for certain transactions (aside from the purchase and sale of goods or the provision or receipt of intercompany loans) increased from SGD1 million to SGD2 million, effective from YA 2026 onwards.

3. **Dating of simplified TPD**

The TPD rules and seventh edition TPG make clear that the contemporaneous TPD requirements apply similarly to simplified TPD. Therefore, to be considered contemporaneous, simplified TPD should also be completed by the tax filing due date and dated accordingly to prove its contemporaneous nature. The IRAS has also provided an example and clarifications through a frequently asked question (FAQ).

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2 Singapore updates key sections of its transfer pricing guidelines (cont.)

4. Guidance on working capital adjustments

The seventh edition TPG clarifies that taxpayers can make working capital adjustments (generally for trade receivables, trade payables and inventory) to improve the reliability of the comparable analysis.

5. Additional guidance on the conditions around remission of the 5% surcharge

Section 34E of the Income Tax Act 1947 applies a 5% surcharge to the value of TP adjustments initiated by the IRAS if the IRAS does not consider the transactions to be at arm's length. The sixth edition TPG outlines certain conditions where the IRAS may fully or partially reduce the surcharge.

In the seventh edition TPG, the IRAS provided additional clarification on the condition of having "good compliance records" in the current YA and the two immediate preceding YAs, to include the requirement that taxpayers also have "no history of surcharges and penalties being imposed, remitted or compounded".

6. Guidance on TP adjustments for capital transactions

The seventh edition TPG clarifies that TP adjustments would not apply to gain, loss or deductions from capital transactions that are not taxable or deductible under the ITA. No TPD is required for these transactions.

7. Additional guidance on strict pass-through costs

The IRAS has clarified one of the conditions (condition (d)) for applying strict pass-through costs. This condition requires that the costs of the acquired services are the legal or contractual liabilities of the related parties benefiting from the services, as demonstrated by a written agreement with the related parties.

8. Guidance on the TP aspects of government assistance

The seventh edition TPG includes a new section with guidance on determining how benefits from government assistance should be treated for TP purposes.

9. Additional guidance on TP audits

For the contemporaneous nature of information submitted as part of a TP audit, FAQ 8 of Appendix B of the seventh edition TPG clarifies that analysis conducted with hindsight generally will not be considered contemporaneous in nature.

10. Removal of the pre-filing phase under the Mutual Agreement Procedure (MAP)

The seventh edition TPG simplifies MAP by removing the steps related to the pre-filing phase; i.e., the notification of intent and pre-filing meeting.

11. Additional guidance on how the IRAS will disregard an actual related party transaction

The IRAS will disregard an actual related party transaction or replace it with an alternative transaction only in exceptional circumstances where:

- The arrangements made in relation to the transaction lack the commercial rationality that would be agreed between independent parties under comparable circumstances.
- The arrangements prevent determination of a price that would be acceptable to both of the parties, taking into account their respective perspectives and the options realistically available to them at the time they enter into the transaction.

Hong Kong

3 Court of Appeal ruled bodies corporate that do not have "issued share capital" would not qualify for stamp duty intra-group transfer relief

On 5 July 2024, the Court of Appeal (CA) handed down its judgement in John Wiley & Sons UK2 LLP and Another v The Collector of Stamp Revenue, overturning the decision made by the District Court (DC) that ruled in favor of the duty payers.

The facts

John Wiley & Sons (HK) Limited (HKCo) is a limited company incorporated in Hong Kong under the former Companies Ordinance, Cap 32 (the Former CO).

The entire issued share capital of HKCo was owned by John Wiley & Sons UK2 LLP (LLP 2).

LLP 2 was 100% beneficially owned by its only member, namely John Wiley & Sons UK LLP (LLP 1).

Both LLP 1 and LLP 2 were limited liability partnerships registered under the Limited Liability Partnerships Act 2000 of the UK.

LLP 1 was 100% beneficially owned by its only member, Wiley International LLC (HoldCo), a limited liability company established in the State of Delaware in the USA.

Transfer of HKCo from LLP 2 to HoldCo

On 30 April 2019, LLP 2 (as transferor) transferred the entire share capital of HKCo to HoldCo (as transferee) for the consideration of GBP313,240,835 (the Share Transfer).

The Share Transfer was apparently made as part of an internal group restructuring of the global John Wiley & Sons group of companies and entities.

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3 Court of Appeal ruled bodies corporate that do not have "issued share capital" would not qualify for stamp duty intra-group transfer relief (cont.)

Claims for stamp duty relief for the intra-group transfer of HKCo

On 29 May 2019, LLP 2 and HoldCo (collectively referred to as the Duty-Payers) applied to the Collector for stamp duty relief in respect of the Share Transfer on the ground that it constituted an intra-group transfer of shares between "bodies corporate" under section 45 of the Stamp Duty Ordinance (SDO).

The Collector rejected the Duty-Payers' claim for stamp duty group relief holding that the 90% test for association in terms beneficially owning at least 90% of the "issued share capital" involved, which is required to be construed in the company law context for section 45 of the SDO, was not satisfied, given that LLP 1 and LLP 2 had no such capital.

The Duty-Payers lodged an appeal to the DC which allowed the stamp duty group relief. The Collector subsequently appealed to the CA against the decision of the DC.

The Court of Appeal's decision

The CA judge considered that the expression "issued share capital" is a well understood concept under the company laws in the UK and Hong Kong and used frequently in tax statutes. As such, the term "issued share capital" would normally need to be interpreted by reference to its meaning under the company laws, unless the relevant legislative provisions or context otherwise require.

In support of his view above, the CA judge quoted Canada Safeway Ltd v IRC [1973] Ch 374 and other tax cases. More relevantly, the judge (Megarry J) in Canada Safeway Ltd v IRC [1973] Ch 374 referred to the company law in the UK to interpret whether it was the nominal (or par) value or the market value of the "issued share capital" of a Canada company that should be counted in determining whether the Canada company can qualify for the stamp duty group relief in the UK.

The CA judge then concluded that the expression "body corporate" in the context of section 45 of the SDO is wider than "company" incorporated under the Former Companies Ordinance/New Former Companies Ordinance and includes foreign companies. On the other hand, the expression "issued share capital" is a well understood concept under company laws. When used in a tax statute, it should prima facie, be interpreted to bear the same meaning as it is employed in the company law context, in the absence of any specific or different definition for that expression or any special context which suggests a different meaning is intended. There is nothing in the context or language of section 45 to indicate that the legislature intends to use the expression "issued share capital" in any different sense.

In the company law context, "share capital" would carry the idea of shares (in discrete or standard units) being allotted or issued to a shareholder in return for money or other forms of consideration paid to or received by the company as capital.

The CA judge then considered that no shares (in the sense of discrete or standard units) in the capital of LLP 2/LLP 1 ever exist, and no such shares have ever been issued to their respective members. Hence, no capital paid by members to LLP 2 and LLP 1 could be regarded as the "issued share capital" of LLP 2/LLP 1 within the meaning of section 45 of the SDO.

The CA judge thus also dismissed Counsel for the Duty-Payers' submission that, for the purpose of section 45, "share capital" signifies, or refers to, "a class of participation interest in the corpus and income of the corporation (or body corporate) issuing it that economically and juristically analogous to share capital at Hong Kong law, albeit not necessarily identical to it".

The Collector's appeal was therefore allowed.

Mainland China

4 To implement taxation by law and standardize incentive policies

The Third Plenary Session of the 20th Central Committee of the Communist Party of China (CPC), held in Beijing from 15 July to 18 July 2024, reviewed and adopted the "Decision of the CPC Central Committee on Further Comprehensively Deepening Reform and Advancing Chinese-style Modernization" (the Decision).

The Decision sets out the comprehensive implementation of the principle of taxation by law, standardizing tax incentive policies, and improving support mechanisms in key areas, highlighting the requirements for further improving tax law, and optimizing the tax business environment. In recent years, China has actively promoted tax legislation, with 13 types of taxes having completed legislation. The taxes yet to complete legislation include value-added tax and consumption tax, and their legislative process is expected to accelerate. The Decision also mentions improving the real estate tax system which includes Land Appreciation Tax, Urban Land Use Tax and Property Tax, indicating that the legislation for related taxes will also steadily advance. In terms of standardizing tax incentive policies, the Decision emphasizes precisely focusing on national strategic areas to enhance the targeting and effectiveness of tax incentives. Tax system reform will further guide resource allocation, encourage innovation and entrepreneurship, create a favorable tax business environment and promote high-quality economic development. For further details, please refer to EY Tax Alert – Reform decisions from Third Plenary Session seek to modernize China's tax system (https://www.ey.com/en_gl/tax-alerts/china-reform-decisions-from-third-plenary-session-seek-to-modernize-chinas-tax-system).

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5 Update on Tax Treaty relief on Dividends derived by Investors from China listed shares

On 19 April 2024, 10 China government bodies including the Ministry of Commerce, China Securities Regulatory Commission (the regulator for the stock market), the State Taxation Administration (STA), etc. jointly issued the Several Policies and Measures on Further Supporting Overseas Institutions to Invest in Domestic Technology-based Enterprises (Shang Cai Fa [2024] No.59, Circular 59). In conjunction with Circular 59, the Operational Guidelines on Facilitating Foreign Institutions to Enjoy Treaty Benefits under Tax Treaties (Guideline) was issued on the same day.

The Guideline stipulates a significant potentially positive change in the procedure for claim of treaty relief by foreign institutions to enjoy treaty relief with respect to investment in China shares.

Currently, when institutional investors invest in China listed stocks and derive dividend income therefrom, a 10% withholding income tax (WHT) is withheld by the China listed companies and remitted to their respective in-charge China Tax Bureau, mostly with the help of the clearance house to deduct the 10% WHT from the gross dividend.

If the investors are eligible to enjoy treaty relief (for example, generally a WHT exemption applicable to Government entities) on such dividends, they must apply for a tax refund with each Tax Bureau of each listed company. This procedure is very time-consuming, and a lot of the time uneconomical.

With the Guideline issued, the above procedure has now been significantly simplified from a refund application to an upfront treaty claim with no withholding.

The investors now can file treaty claims directly to the STA (the highest level of China Tax Authority), and the STA will notify the clearing house (China Securities Depository and Clearing Corporation Limited, CSDCC), who will further notify the China listed companies not to withhold WHT on dividends distributed to the investors. Cashflow wise, the investors will now receive gross dividend amounts.

The eligibility for treaty relief is subject to a post-filing review and assessment by the local authorities.

The Guideline mainly intends to address the treaty relief procedure for the China A-shares invested through Qualified Foreign Investors (Qualified Foreign Institutional Investors, Renminbi Qualified Foreign Institutional Investors). At the current stage, China A-shares invested through Stock Connect and H shares are not covered.

Australia

6 Pillar 2 Tax Laws

Three new tax Bills introduced to Australian Parliament on 4 July 2024. The Bills are connected and relate to the Base Erosion and Profit Shifting (BEPS) global initiative, in line with the Organization for Economic Co-operation and Development's (OECD) BEPS Pillar two initiative. At a very broad level, the Bills seek to implement a 15% global minimum tax and domestic minimum tax within Australian tax law (as per OECD guidelines) and will be applicable to Australian parents of multinational groups as well as Australian subsidiaries of a multinational group.

The rules will be implemented into Australian tax law via an 'Income inclusion rule' (IIR) and Undertaxed Profits Rule (UTPR) in order to ensure a global and/or domestic minimum tax of 15% is paid by the multinational group. Australia will apply the IIR and domestic minimum tax rules for income years commencing on or after 1 January 2024 (another retrospective law) and the UTPR for income years commencing after 1 January 2025. All three Bills were referred to the Senate Economics Legislation Committee for reporting by 14 August 2024 and The committee recommends that the bills be passed.

The Pillar 2 rules will only apply to multinational groups with a consolidated accounting revenue exceeding EUR750 million (approximately AUD1.2 billion) or more in at least two of the last four financial years. Special aggregation rules will apply in the context of M&A transactions. Importantly, unlike the Significant Global Entity rules, it is not expected that the Pillar 2 rules will extend to a Fund vehicle and are intended to rely on actual accounting consolidation / investment entity exception concepts rather than notionally looking through.

7 Foreign resident capital gains tax regime proposals

It is proposed to amend the Division 855 of Income Tax Assessment Act 1997 in respect of capital gains and foreign resident rules (the Division 855 proposals) to ensure that Australia can tax foreign residents on direct and indirect disposals of assets with a close economic connection to Australian land and/or natural resources.

The amendments will apply to capital gains tax events commencing on or after 1 July 2025 to:

- Clarify and broaden the types of assets that foreign residents are subject to capital gains tax (CGT) on (taxable Australian real property (TARP)). Examples include:

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7 Foreign resident capital gains tax regime proposals (cont.)

- ► Leases or licenses to use land situated in Australia, including (but not limited to) pastoral leases and licenses, for example:
  - ► an agreement to lease land that is used in a manner that gives rise to the creation of emissions permits.
- ► Australian water entitlements in relation to land situated in Australia.
- ► Infrastructure and machinery installed on land situated in Australia, including land subject to a mining, quarrying or prospecting right of an entity, for example:
  - ► energy and telecommunications infrastructure, such as wind turbines, solar panels, batteries, transmission towers, transmission lines and substations.
  - ► transport infrastructure, such as rail networks, ports and airports.
  - ► heavy machinery installed on land for use in mining operations, such as mining drills and ore crushers.
- ► An option or right to acquire one of the above assets (or similar asset types with a close economic connection to Australian land and/or natural resources).
- ► By extension including these assets in the rules for determining what are indirect Australian real property interests (IARPI) (non-portfolio membership interest in an entity (being an interest of 10% or more) where more than 50 per cent of the underlying entity's market value is derived from TARP).

► Amend the point-in-time principal asset test used as part of determining whether membership interests are IARPI, to a 365-day testing period.

► Require foreign residents disposing of shares and other membership interests exceeding AUD20 million in value to notify the Australian Taxation Office in the approved form prior to the transaction being executed, that they have made a vendor declaration to a purchaser that they are non-IARPI interests. Possible timelines proposed are from 28 up to 60 days prior.

Specific integrity rules are also under consideration in relation the valuation of TARP assets and arrangements entered into to avoid CGT by selling economic interests in TARP, or rights to future income over TARP, instead of selling the TARP asset directly. Submissions were completed by 20 August 2024.

8 Foreign resident capital gains withholding tax regime (FRCGW)

The FRCGW is a non-final withholding tax which broadly applies to purchasers of either TARP or an IARPI or options or rights to acquire these assets from a foreign resident vendor. The withholding obligation applies to both Australian resident and foreign resident purchasers. Some exceptions apply and the obligation to withhold can be avoided through certain clearance certificates and vendor declarations or a variation in the rate of withholding can be sought.

It is proposed to increase the FRCGW rate for relevant CGT assets from 12.5% to 15% and to remove the current AUD750,000 threshold before which withholding applies (applies only to some assets).

This change is intended to ensure better compliance by foreign residents with their Australian tax obligations and support the collection of tax liabilities from foreign residents and complement the Division 855 proposals.

The changes will apply to acquisitions of relevant CGT assets made on or after the later of 1 January 2025 and the 1st day of the quarter after the bill receives royal assent. Submissions were completed by 20 August 2024.

India

9 Premium received on redemption of debentures is taxable as interest

In a recent decision [TS-293-ITAT-2024(Mum)], the Mumbai Tribunal concluded that redemption of non-convertible debentures (NCDs) constitutes the realization of a loan and should be classified as interest income as against capital gains (as reported by taxpayer in its tax return). The key observations of the Tribunal are summarized below:

- ► The premium on redemption of NCDs is calculated using an interest rate on the face value, similar to how deep discount bonds are priced to equate maturity proceeds with face value.
- ► Issuers of deep discount bonds are allowed to deduct interest, suggesting that the premium on NCDs is effectively interest.
- ► The Tribunal rejected taxpayer's argument that NCDs are similar to Market linked debentures (MLDs) and therefore the treatment followed for MLDs should equally apply to NCDs by noting that MLDs differ from NCDs, as equity and debt are distinct, and debenture holders are creditors, not equity investors.
- ► At redemption, debentures are returned to the issuer, and the creditor's loan is repaid, negating the possibility of capital gains. Capital gains on debentures may only occur if they are sold in the market to a third party before maturity or redemption. Therefore, the premium received upon debenture redemption is characterized as interest income and is taxable under "Income from Other Sources."

India

9 Premium received on redemption of debentures is taxable as interest (cont.)

The above ruling is in line with recent Delhi Tribunal ruling in the case of BCP v. Singapore FVCI Pte. Ltd. [TS-27-ITAT-2024(DEL)] which had broadly concluded that redemption proceeds should not be characterized as capital gains. It may be noted that the facts in the present case had fixed redemption premium and not linked to underlying performance of Indian company and therefore the Mumbai Tribunal distinguished the same from MLDs. It may therefore be possible to distinguish this ruling in a case where redemption premium on debt instrument is determined based on underlying performance of Indian company (similar to MLDs).

It may also be noted that this ruling has clarified that gains arising from the transfer of NCDs to third party should be characterized as capital gains and not interest income. This ruling could be relied by foreign taxpayers/ foreign funds (such as Singapore, Mauritius, United Arab Emirate, Netherlands etc) who are tax resident of country with whom India has signed double taxation avoidance agreement (DTAA) which exempts capital gains arising from sale of debt instrument from Indian taxes.

10 Availability of benefits of India-Mauritius tax treaty on grandfathered investments (i.e. investment prior to 1 April 2017) including observation on the applicability of India-Mauritius Protocol

Delhi Tribunal in case of Maven India Fund [TS-528-ITAT-2024(DEL)] has concurred with the factual findings of the Commissioner of Income Tax (Appeals) and has ruled that the taxpayer is a genuine resident of Mauritius. The taxpayer has a tax resident certificate (TRC), Category I Global Business License and Securities and Exchange Board of India registration which demonstrate its residency. Further, the taxpayer has also continued its investment activities post amendment to the India-Mauritius treaty in 2017. Additionally, the Inland Revenue Authority were not able to bring to record and material to establish that the entity was not the beneficial owner of the income.

In addition to the above, in relation to applicability of the new India-Mauritius Protocol, the Delhi Tribunal stated that the same shall come into force only after each contracting state notifies it. Thus, given that it is yet to come into force, the Protocol cannot be stated to be currently applicable.

It may be noted that recently, the Delhi Tribunal in the case of India Property (Mauritius) Company [TS-514-ITAT-2024(DEL)] and Tiger Global Eight Holdings [2024] 165 taxmann.com 16 (Delhi - Trib.) allowed the claim of exemption under Article 13(4) of the India-Mauritius DTAA based on a valid TRC, Supreme Court's judgment and circulars issued by Indian tax administrator (i.e. Central Board of Direct taxes).

It may be noted that the above favorable rulings have been delivered in spite of the fact that earlier this year the Hon'ble Supreme Court had put an interim stay on the favorable Hon'ble Delhi High Court's judgment in case of Blackstone Capital Partners (Singapore) VI FDI Three Pte Ltd W.P.(C) 2562/2022 & CM Appl. 7332/2022 which had granted benefit of India-Singapore DTAA on the strength of TRC.

11 Key announcements made under Finance (No. 2) Bill, 2024

1. **Changes in capital gains tax regime**

- Increase in capital gains tax on sale of listed shares from 10% to 12.5% for long term capital gains and 15% to 20% for short term capital gains.
- Long term capital gains tax on sale of unlisted shares increased from 10% (as applicable to non-resident) to 12.5%.
- No change in surcharge or cess rates which continues to apply over and above the base tax rates.
- Unlisted debt securities (including compulsory convertible debentures) to be treated as short term capital asset and therefore subject to higher tax rate regardless of period of holding.

2. **Headline corporate tax rate for foreign companies reduced from 40% to 35%. This will impact short term capital gains taxes payable by foreign companies on sale of shares of unlisted Indian companies.**

3. **Reduction in time limit for re-assessment proceedings from 11 years to 6 years and 3 months from the end of relevant financial year (applicable from 1 September 2024).**

4. **Introduction of time limit for passing withholding tax order**

The Indian income-tax law prescribed period of 7 years from relevant financial year for passing withholding tax order in relation to resident payees. There was no time limit prescribed for non-resident payees.

- It is now proposed to (a) expand the scope to cover non-resident payees, as well and (b) reduce the time limit from 7 years to 6 years.
- This proposal coupled with reduction in re-assessment time limit would be relevant while negotiating tax indemnity period coverage in a potential deals and/or while obtaining tax insurance.
- The angel tax provisions which taxed closely held domestic companies on receipt of consideration for share issuance in excess of its fair market value to be withdrawn from 1 April 2024.

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11 Key announcements made under Finance (No. 2) Bill, 2024 (cont.)

5. **Changes in taxation of share buy-back by company**

- At present, consideration payable to investors on buy-back of shares of an Indian company was subject to buyback distribution tax of ~24%.
- However, it is now proposed that the buy-back consideration will be taxable in the hands of investors as "deemed dividend" (previously it was subject to buy-back distribution tax in the hands of Indian company).
- The cost of acquisition of the said shares to be allowed as a capital loss and may be set-off / carry forward against other capital gains.
- It may be interesting to evaluate whether the tax treatment of buy-back consideration (i.e. whether capital gains or dividend) under applicable DTAA.

6. **Gift of shares or property paid by corporates to no longer be exempt from capital gains taxes. Capital gains taxes required to be paid at its fair market value as prescribed.**

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